Supreme Court, U. S.
FILED
JUL 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-1507

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHEYENNE RIVER SIOUX TRIBE OF INDIANS, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

WALTER W. BARNETT,
VINCENT F. O'ROURKE, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1507

CHEYENNE RIVER SIOUX TRIBE OF INDIANS, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 566 F. 2d 1085. The opinion of the district court (Pet. App. C) is reported at 424 F. Supp. 448.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1977. A timely petition for rehearing was denied on January 24, 1978. The petition for a writ of certiorari was filed on April 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether elections on the ratification or amendment of tribal constitutions, conducted for Indian tribes by the Secretary of the Interior pursuant to the Indian Reorganization Act, are governed by the Twenty-Sixth Amendment.

STATEMENT

The Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. 461 *et seq.*, establishes procedures by which Indian tribes may organize with the assistance of the Secretary of the Interior for the purpose of governing their internal affairs. Under the provisions of the Act (25 U.S.C. 476) and applicable regulations, the Secretary of the Interior is required to call and supervise elections, known as "Secretarial" elections,[1] for the adoption, amendment or revocation of constitutions of Indian tribes organized under the Act. His supervisory duties include (1) authorizing the election (25 C.F.R. 53.8); (2) having a representative serve as one member of a three-member Election Board (25 C.F.R. 52.8); (3) maintaining voter registration lists (25 C.F.R. 52.10a(b)); (4) deciding election contests (25 C.F.R. 52.18); and (5) approving adopted amendments (25 U.S.C. 476).

Although all Indian tribes may decline to participate under the Act (see 25 U.S.C. 478, 478a), the eligible voters of the Cheyenne River Sioux Tribe (petitioner) chose by referendum in 1935 to include their Tribe within the operations of the Act (Pet. 5). At a Secretarial election held pursuant to the Act, they adopted a tribal constitution which the Secretary duly approved (Pet. 5). At the time of this referendum, the eligible voters in Secretarial elections included all "adult Indians," defined by the Act as Indians who had "attained the age of twenty-one years." See 25 U.S.C. 476, 479.

---

[1]The phrase "Secretarial elections" distinguishes elections conducted by the Secretary of the Interior under federal authority from elections conducted under tribal authority, such as elections conducted pursuant to constitutions adopted at Secretarial elections. See *Wounded Head* v. *Tribal Council of the Oglala Sioux Tribe*, 507 F. 2d 1079, 1084 (C.A. 8); Pet. App. 5b and n. 6.

The Twenty-Sixth Amendment to the United States Constitution was ratified in July 1971. Section 1 provides:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The Secretary of the Interior took the position that this Amendment superseded the 21-year voter age requirement set by the Act. He therefore promulgated regulations (25 C.F.R. 52.1(e), 52.10a(a), 52.11) extending the franchise for Secretarial elections to qualified Indians who have "attained the age of 18 years" (Pet. App. 6b).

In April 1976, the Council of the Cheyenne River Sioux Tribe asked the Secretary to call a referendum election on a proposed amendment to the tribal constitution. The Secretary complied and, pursuant to his regulation (25 C.F.R. 52.1(e)), announced that otherwise eligible individuals 18 years of age or older on the date of the election were entitled to vote (Pet. 6-7; Pet. App. 6b-7b).

Petitioner then brought this action in the United States District Court for the District of South Dakota, seeking declaratory and injunctive relief on the basis that the Secretary's regulations were in conflict with the provision of the Tribe's constitution setting the minimum voting age at 21 years (Pet. App. 6b-7b). The district court entered summary judgment for petitioner. That court held that Indian tribes retain the inherent power to establish voting age criteria for tribal elections and that the tribal constitution, rather than the Secretary's regulation, controls (Pet. App. 6c).

The court of appeals reversed and ordered entry of summary judgment for the Secretary. The court of appeals

held that Secretarial elections must be considered federal and not tribal elections because of

> the source of the Secretary's regulatory authority over these elections, such authority having congressional and not tribal, origin. The Congress, not the Tribe, delegates to the Secretary the authority to call and conduct Secretarial elections, and the Congressional definition of "adult Indians" in 25 U.S.C. §479 leaves no doubt that it intended a uniform *federal* age qualification for voters in Secretarial elections. [Pet. App. 8b; emphasis in original.]

Since the Twenty-Sixth Amendment is self-executing and invalidates voter age qualifications higher than 18 years, the court of appeals concluded that "the Secretary had complete authority, indeed a mandate, to recognize the age of 18 years as the eligible voting age for adult Indians with respect to the adoption of a tribal constitution", and that the same was true with respect to the amendment of a tribal constitution (Pet. App. 9b-10b).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review.

1. It is well established that the Constitution's restrictions on federal and state action do not limit the sovereign powers of Indian tribes. *Talton* v. *Mayes*, 163 U.S. 376. If the election in this case were to be conducted solely by the Tribe, pursuant to its own authority alone, the Twenty-Sixth Amendment would have no application. The Tribe would be free to set the minimum voting age at 21.[2] But that is not this case.

---

[2]The Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. 1301 *et seq.*, does not contain an analogue to the Twenty-Sixth Amendment.

The election here is to be conducted by the Secretary of the Interior pursuant to the Indian Reorganization Act. 25 U.S.C. 461 *et seq.* The Tribe has voluntarily chosen to organize under that Act and to adopt a tribal constitution pursuant to its provisions. By that choice, the Tribe has agreed to a congressionally mandated procedure under which the federal government establishes the rules governing elections to adopt, amend, or revoke tribal constitutions, and conducts those elections. The provisions of the Indian Reorganization Act, not the principles of tribal sovereignty, are therefore controlling here.

The Indian Reorganization Act does not leave determination of the minimum voting age to the individual tribes. Section 16, 26 U.S.C. 476, states that an Indian tribe "may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe."[3] And Section 19, 25 U.S.C. 479, states: "The words 'adult Indians' * * * shall be construed to refer to Indians who have attained the age of twenty-one years." The court of appeals correctly concluded (Pet. App. 8b; emphasis in original) that by these provisions Congress "intended a uniform *federal* age qualification for voters in Secretarial elections."[4]

---

[3]Section 16 also provides that the constitution and bylaws may be revoked or amended in the same manner.

[4]There is no anomaly in the congressional decision to place limitations on tribal powers in an Act revitalizing the self-government of the tribes. The legislative history of the Indian Reorganization Act establishes that Congress meant to balance the greater freedom with greater responsibilities. During the Senate debate Senator Wheeler,

We believe that the Twenty-Sixth Amendment prohibits Congress from prescribing a minimum voting age for Secretarial elections that excludes voters "eighteen years of age or older." Whether or not Congress could have left the minimum voting age to be determined by the individual tribes, it did not do so. If the decision below is incorrect, then Congress has established a requirement that prohibits 18-year-olds from voting even if the tribes wish them to do so, the Twenty-Sixth Amendment notwithstanding. Congress has no such choice; it must either abolish the federal age requirement or set it at the age of 18.

The Twenty-Sixth Amendment is self-executing. Cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325. The court of appeals was therefore correct in holding "that the Secretary had complete authority, indeed a mandate" (Pet. App. 9b), to set the age of eligibility for Secretarial elections at 18.[5]

2. Petitioner also contends (Pet. 10-12) that as a result of the decision below, the Fifth and Fifteenth Amendments will apply to referendum elections conducted by the Secretary.

To the extent that petitioner suggests that the Fifth Amendment must apply to actions by the Indian tribes, the suggestion is mistaken. The Constitution applies only to

---

one of the bill's sponsors, stated that it was intended (78 Cong. Rec. 11123 (1934) (emphasis added)):

> to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, *though limited*, authority, and by *prescribing conditions which must be met* by such tribal organizations.

[5]There is no conflict with *Talton* v. *Mayes*, *supra*, or *United States* v. *Wheeler*, No. 76-1629, decided March 22, 1978. See Pet. 6-9. Those cases involved actions by Indian tribes in their sovereign capacity, not

acts by the Secretary, not by the tribes themselves. *Talton* v. *Mayes*, *supra*. The actions of the Secretary are already subject to judicial review (as this case attests) insofar as they may be thought to depart from the mandates of the Indian Reorganization Act. Should the Secretary act arbitrarily or without rational basis in the course of a Secretarial election, his conduct may also be subject to review under the applicable constitutional standard. There is nothing unreasonable in that result.

The Fifteenth Amendment prohibits limitations on the right to vote "on account of race, color, or previous condition of servitude." But this Court has held that "federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' " group consisting of 'Indians'." *United States* v. *Antelope*, 430 U.S. 641, 646; *Morton* v. *Mancari*, 417 U.S. 535, 553 n. 24. Accordingly, the Fifteenth Amendment would not prohibit the Secretary from limiting participation in referendum elections under the Indian Reorganization Act to eligible tribal members.

---

actions by the Secretary of the Interior pursuant to congressional mandate. The question here is whether federal standards, rather than tribal standards, bring the federal Constitution into play.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

WALTER W. BARNETT,
VINCENT F. O'ROURKE, JR.,
Attorneys.

JUNE 1978.